

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOILERMAKERS NATIONAL ANNUITY
TRUST FUND, on behalf of itself and all
others similarly situated,

Plaintiff,

v.

WAMU MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2006-AR1, *et al.*,

Defendants.

Case No. C09-0037 MJP

**MOTION (1) FOR LEAVE TO
AMEND THE CONSOLIDATED
COMPLAINT; (2) TO DENY
DEFENDANTS' PENDING
MOTIONS AS MOOT AND
WITHOUT PREJUDICE; AND (3)
TO MODIFY THE COURT'S
SCHEDULING ORDER**

NEW ORLEANS EMPLOYEES'
RETIREMENT SYSTEM, *et al.*,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR
WASHINGTON MUTUAL BANK, *et al.*,

Defendants.

**Noted on Motion Calendar:
March 5, 2010**

NEW ORLEANS EMPLOYEES'
RETIREMENT SYSTEM, *et al.*,

Plaintiffs,

v.

THE FIRST AMERICAN CORPORATION, *et
al.*,

Defendants.

MOTION (1) FOR LEAVE TO AMEND THE CONSOLIDATED COMPLAINT;
(2) TO DENY DEFENDANTS' PENDING MOTIONS AS MOOT AND WITHOUT
PREJUDICE; AND (3) TO MODIFY THE COURT'S SCHEDULING ORDER
Case No.: C09-0037 (MJP)

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1 **PRELIMINARY STATEMENT**

2 Lead Plaintiff seeks to amend the Amended Consolidated Complaint and to modify the
3 Court's scheduling order dated December 18, 2009 (Dkt. No. 188) for two reasons: (1) to respond to
4 recent judicial decisions (including orders issued by this Court) and certain issues raised by
5 Defendants in their respective motions to dismiss; and (2) to seek to consolidate this of action with
6 *Doral Bank Puerto Rico v. Washington Mutual Asset Acceptance Corp.*, No. C09-1557
7 (MJP)(hereinafter "the *Doral* Action"), thus eliminating redundant briefing and waste of judicial and
8 litigant resources.¹ In addition, Lead Plaintiff requests that each of the three pending motions to
9 dismiss be denied without prejudice.

10 **STATEMENT OF FACTS**

11 On October 23, 2009, the Court appointed Chicago PABF as lead plaintiff and Scott+Scott
12 LLP as lead counsel, with Tousley Brain Stephens PLLC as local counsel. Dkt. No 95.

13 On October 30, 2009, Plaintiff Doral Bank Puerto Rico ("Doral Bank") filed the *Doral*
14 Action, which presents similar allegations to this Action. (Dkt. No. 101 at 2-3; *see also* No. C09-
15 1557MJP at Dkt. No. 1.) However, the *Doral* complaint set forth allegations arising out of a March
16 13, 2007 registration statement, which was not included in the PSLRA notice provided to potential
17 class members. On November 19, 2009, Lead Plaintiff and plaintiff in the *Doral* Action filed a joint
18 motion to consolidate the cases. Dkt. No. 101.

19 On December 18, 2009, the Court denied the joint motion for consolidation "without
20 prejudice to revisit the issue after notice has been provided to potential Doral plaintiffs." Dkt. No.
21 118. The Court then directed Lead Plaintiff here to file an amended consolidated complaint. *Id.*

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24 ¹ On February 24, 2010, Lead Plaintiff circulated a proposed stipulation and agreed motion for
25 leave to amend and to modify the scheduling order to all parties. While Defendants WaMu Asset
26 Acceptance Corporation, WaMu Capital Corporation, Washington Mutual Mortgage Securities
27 Corporation, David Beck, Diane Novak, Rolland Jurgens and Richard Careaga consented to the
filing of the stipulation; consent was not unanimous. Thus, Lead Plaintiff now files this motion.

1 On December 31, 2009, Lead Plaintiff filed the operative complaint in this action setting
2 forth federal and state securities claims based on false and misleading statements in the offering
3 documents for 24 offerings of Certificates and deleting claims based on additional Certificates issued
4 pursuant to the March 13, 2007 Registration Statement. Dkt. No. 130.

5 On January 28th and 29th, 2010, Defendants WaMu Asset Acceptance Corporation, WaMu
6 Capital Corporation, Washington Mutual Mortgage Securities Corporation, David Beck, Diane
7 Novak, Rolland Jurgens and Richard Careaga, and the Appraiser and Ratings Agency Defendants
8 filed their respective motions to dismiss (Dkt. Nos. 138, 144 and 146.) Lead Plaintiff's responses in
9 opposition to these motions are due March 12, 2010. Dkt. No. 151.

10 On December 24, 2009, PSLRA notice of the *Doral* Action was published. On February 22,
11 2010, Doral Bank and one other party filed competing motions for appointment as lead plaintiff.
12 The motions for lead plaintiff are noted for March 12, 2010. Within five days after the Court rules
13 on the competing lead plaintiff motions, Lead Plaintiff will move to consolidate the *Doral* Action
14 with this action.

15 **ARGUMENT**

16 **A. This Court Should Grant Leave to Amend**

17 **1. The Nature of the Amendment**

18 Plaintiff brings this motion so that the claims raised in the *Doral* Action, and all the claims
19 which Plaintiff proposes to plead in this action, can be consolidated in a single pleading and resolved
20 on a consistent and efficient basis. Based upon the arguments and authorities included in the
21 pending motions, and in a number of recent decisions impacting Plaintiff's claims (including by this
22 Court), as well as facts learned from related litigations, Plaintiff proposes to withdraw certain claims,
23 plead others, and supplement its factual allegations. Specifically, Plaintiff seeks leave to amend its
24 claims in the following respects:

- 25 (1) to withdraw all claims under the Securities Act of 1933, 15 U.S.C. §§77k (the
26 "Securities Act") against Defendants The First American Corporation ("First
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American”) and eAppraiseIT, LLC (“eAppraiseIT”) (collectively, the “Appraiser Defendants”);

(2) to conform the Complaint to this Court's holding in its October 27, 2009 Order with respect to standing in the *In re Washington Mutual, Inc. Securities Litigation*, No. 2:08-md-1919 (MJP) (the “MDL Action”), by withdrawing allegations related to offerings of Certificates that were not purchased by named plaintiffs;

(3) to include additional facts, including, but not limited to, facts concerning the various Defendants' involvement in the marketing and sale of the WaMu Mortgage Pass-Through Certificates (the “Certificates”);

(4) to allege a claim under 17 C.F.R. §240.10b-5 (“Rule 10b-5”) against Defendants The McGraw-Hill Companies (“S&P”) and Moody’s Investors Service, Inc. (“Moody’s”) (collectively, the “Rating Agency Defendants”);

(5) to allege claims under California’s Unfair Competition Law (“UCL”), Business & Professions Code §17200 *et seq.* against the Appraiser Defendants.

2. The Standard for Granting Leave to Amend

The decision to allow or disallow an amendment is committed to the sound discretion of the district court. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Accordingly, a motion for leave to amend must be decided upon the facts and circumstances of each particular case. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987).

Federal Rule of Civil Procedure 15(a) provides that a court “should freely give leave [to amend] when justice so requires.” In interpreting this language, the Supreme Court and the Ninth Circuit have repeatedly held that Rule 15(a) expresses a strong presumption in favor of allowing parties to amend a complaint. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). As *Foman* explained:

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1 In the absence of any apparent or declared reason – such as undue delay, bad faith or
2 dilatory motive on the part of the movant, repeated failure to cure deficiencies by
3 amendments previously allowed, undue prejudice to the opposing party by virtue of
allowance of the amendment, futility of amendment, etc. – the leave sought should,
as the rules require, be “freely given.”

4 *Foman*, 371 U.S. at 182.

5 There is No Undue Delay, Bad Faith or Dilatory Motive in Seeking Leave to Amend

6 Amendments are permitted where, as here, the delay was not caused by any lack of diligence
7 on the plaintiff’s part. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000)
8 (the standard for considering proposed amendments after the scheduling order deadline ““primarily
9 considers the diligence of the party seeking the amendment””) (citation omitted). Only on February
10 22, 2010, did the 60-day window for applying for lead plaintiff in the *Doral* Action close. Also,
11 since the filing of this case, there have been a number of recent decisions bearing on Plaintiff’s
12 claims. *See, e.g.*, decisions entered in *In re Lehman Bros. Securities and ERISA Litigation*, No. 09
13 MD 2017, 2010 WL 337997 (S.D.N.Y. Feb. 1, 2010), and 2010 WL 545992 (S.D.N.Y. Feb. 17,
14 2010). With respect to the new claims Plaintiff seeks to add, the recent case of *Operating Local 649*
15 *Annuity Trust Fund v. Smith Barney Fund Management LLC*, No. 07-5125-cv, 2010 WL 520896 (2d
16 Cir. Feb. 16, 2010) strengthens Plaintiff’s position that Securities Exchange Act of 1934 claims
17 against the Rating Companies based on their conflicts of interest are available, and *Yokoyama v.*
18 *Midland Nat’l Life Ins. Co.*, No. 07-16825, 2010 WL 424817 (9th Cir. Feb. 8, 2010) has factored
19 into Plaintiff’s assessment that a class may be certified for the proposed California unfair
20 competition and consumer claims.

21 Granting Leave to Amend Would Cause no Undue Prejudice to Defendants

22 In the Ninth Circuit, “it is the consideration of prejudice to the opposing party that carries the
23 greatest weight.” *Eminence Capital*, 316 F.3d at 1052. “Absent prejudice, or a strong showing of
24 any of the remaining *Foman* factors, there exists a **presumption** under Rule 15(a) in favor of
25 granting leave to amend.” *Id.* (emphasis in original).

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Here, as described above, should this lawsuit and the *Doral* Action be consolidated, both cases could be pled and briefed together, which would enhance efficiency and thereby benefit all parties and the Court.

B. This Court Should Deny All Defendants' Pending Motions as Moot and Adjust the Briefing Schedule

To permit resolution of a single set of motions, the pending motions to dismiss should be denied without prejudice as moot and the current briefing schedule should be adjusted to provide for motions to be made on the Second Amended Consolidated Complaint. Because Plaintiff intends to withdraw certain claims, presumably Defendants will need to modify their motions, at least in part. To avoid unnecessary confusion and undue burden on the Court, one set of updated motions should be filed and resolved.

CONCLUSION

For all the reasons stated above, Plaintiff's motion for leave to amend should be granted, all Defendants' pending motions should be denied without prejudice as moot and the briefing schedule should be modified in accordance with the attached proposed order.

Dated: February 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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